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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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In the matter of:

ARTHUR B. COOPER
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8025 E. Redwing
Scottsdale, Arizona 85250

LINDA EBINGER-COOPER
CRD # 1353173
8025 E. Redwing
Scottsdale, Arizona 85250

Respondents.

DOCKET NO. S-03550A-04-0000

SECURITIES DIVISION'S
MOTION TO ALLOW
TELEPHONIC TESTIMONY

The Securities Division of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witnesses Edward Morrell and Peter Hudson during the hearing of the above-referenced matter beginning on November 1, 2005. This request is submitted on the grounds that, although these individuals can provide testimony that will provide key information at this administrative hearing, special circumstances prevent their actual appearance in Phoenix, Arizona during the course of this proceeding.

For this primary reason, and for others addressed in the following Memorandum of Points and Authorities, the Division's Motion to Allow Telephonic Testimony should be allowed.

Respectfully submitted this 11th day of October, 2005.

By

Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Division anticipates calling Edward Morrell ("Morell") and Peter Hudson ("Hudson") as central witnesses to this hearing. Morell and Hudson can offer probative testimony as to this case. In so doing, both can provide evidence supporting a number of the allegations brought by the Division in this case. Morrell lives out of state in Connecticut. Hudson lives out of state in California, and works a full-time job. As such, the burdensome task of traveling to Phoenix to provide testimony in person is impractical.

The prospective witnesses above can offer highly probative evidence in this matter, yet face one or more obstacles that prevent their appearance at this hearing. The simple and well-recognized solution to this problem is to allow for telephonic testimony; through this manner, not only will relevant evidence be preserved and introduced, but all parties will have a full opportunity for questioning - whether by direct or cross-examination.

II. ARGUMENT***A. Telephonic Testimony in Administrative Hearings is Supported Both Under Applicable Administrative Rules and through Court Decisions***

The purpose of administrative proceedings is to provide for the fair, speedy and cost effective resolution of administratively justiciable matters. To effectuate that purpose, the legislature provided for streamlined proceedings and relaxed application of the formal rules of evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of contested administrative cases. The evidence submitted in an administrative hearing need not rise to the level of formality required in a judicial proceeding, as long as it is "substantial, reliable and probative." In addition, the Commission promulgated rules of practice and procedure to ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,* A.A.C. R14-3-101(B); R14-3-109(K). Allowing Morrell and Hudson to testify by telephone retains all indicia of reliability and preserves Respondents' right to cross-examination.

1 Consistent with these administrative rules, courts have routinely acknowledged that
2 telephonic testimony in administrative proceedings is permissible and consistent with the
3 requirements of procedural due process. In *T.W.M. Custom Framing v. Industrial Commission of*
4 *Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged an validity of an ALJ's
5 judgment, partly on the fact that the ALJ had allowed two of the Industrial Commission's
6 witnesses to appear telephonically. The Court initially noted that telephonic testimony was
7 superior to a mere transcription of testimony because the telephonic medium "preserves
8 paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in making
9 determinations of credibility." See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court then
10 went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and are
11 charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,
12 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic
13 testimony offered in this case was fully consistent with the requirement of "substantial justice."

14 Other courts have reached similar conclusions with respect to the use of telephonic
15 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of Industrial*
16 *Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was asked to
17 review a trial court's determination that a hearing officer's admittance of an inspector's
18 telephonic testimony violated C & C's due process rights and prejudiced C & C by preventing it
19 from cross-examining the inspector's notes. The appellate court rejected the trial court's
20 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative
21 hearing of this nature need not be conducted according to the technical rules relating to evidence
22 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court
23 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*
24 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the
25 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings
26 involving telephonic testimony as:

1 “a pragmatic solution, made possible by modern technology, which
2 attempts to reconcile the problem of geographically separated adversaries
3 with the core elements of a fair adversary hearing: the opportunity to
 cross-examine adverse witnesses and to rebut or explain unfavorable
 evidence.”

Id. at 251, 131 Cal.Rptr. at 422.

4 Based on similar reasoning, a number of other state courts have recognized that, in the
5 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and
6 consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*
7 *Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division’s
8 procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238,
9 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).
10 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of
11 administrative hearings, “fundamental fairness” is not compromised through the allowance of
12 telephonic testimony.

13 The telephonic testimony request in the present case fits squarely within the tenor of these
14 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could
15 otherwise not testify; the prospective testimony of these witnesses will be “substantial, reliable
16 and probative,” and will meet all requirements of substantial justice. In other words, evidence
17 bearing on the outcome of this trial will not be barred, and respondents will still have every
18 opportunity to question the witnesses about their testimony and/or about any exhibits discussed.

19 **B. *The Arizona Corporation Commission has a well-recognized History of***
20 ***Permitting Telephonic Testimony during the Course of Administrative Hearings***

21 In light of the relaxed evidentiary and procedural rules governing administrative hearings
22 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
23 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
24 telephonic testimony in their administrative hearings to introduce probative evidence. This
25 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet*
26

1 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.
2 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-
3 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

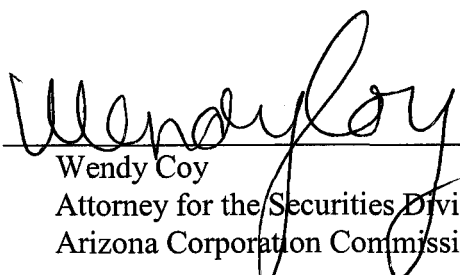
4 In this instance, the Division is seeking permission to introduce the telephonic testimony
5 of two of approximately ten prospective witnesses scheduled to testify. Only where telephonic
6 testimony is the only option available does the Division seek leave to offer this form of
7 testimony. Consistent with past determinations in this forum, leave to introduce the telephonic
8 testimony of these prospective witnesses is warranted.

9 **III. CONCLUSION**

10 Permitting Edward Morrell and Peter Hudson to testify telephonically at the upcoming
11 administrative hearing allows the Division to present relevant witness evidence that is expected to
12 be reliable and probative, is fundamentally fair, and does not compromise Respondents' due
13 process rights. Therefore, the Division respectfully requests that its motion for leave to present
14 such telephonic testimony be granted.

15 RESPECTFULLY SUBMITTED this 11th day of October, 2005.

16
17
18 By


Wendy Coy

Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 11th day of October, 2005, with

3 Docket Control
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7 COPY of the foregoing hand-delivered this
8 11th day of October, 2005, to:

9 ALJ Marc Stern
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13 COPY of the foregoing mailed
14 this 11th day of October, 2005, to:

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